U.S. Department of Labor

Office of Administrative Law Judges
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Date: September 27, 2000

Case No. 1999-BLA-1306

In the Matter Of

ARNOLD REYNOLDS,

Claimant,

v.

UTILITY COALS, INC.,

Employer,

and

SHELL MINING COMPANY,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

William Lawrence Roberts, Esq.
Pikeville, Kentucky
For the Claimant.

Eileen O'Brien, Esq.
Lexington, Kentucky
For the Employer.

Maribeth Bernui, Esq.
Nashville, Tennessee
For the Director.

BEFORE: DANIEL J. ROKETENETZ

Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 901 *et seq.*, and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On August 30, 1999, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a hearing. (Dir. Ex. 35)[1] A formal hearing in this matter was conducted on February 3, 2000 in Pikeville, Kentucky, by the undersigned. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

ISSUES

The issues in this case are:

1. Whether the claim was timely filed;

2. Whether the person upon whose disability the claim is based is a miner;

3. Whether the Claimant worked at least twenty years in or around one or more coal mines;

4. Whether the Claimant has pneumoconiosis as defined in the Act and regulations;

5. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

6. Whether the Claimant is totally disabled;

7. Whether the Claimant's disability is due to pneumoconiosis;

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[1] In this Decision and Order, "Dir. Ex." refers to the Director's exhibits, "Er. Ex." refers to the Employer's exhibits and "Tr." refers to the transcript of the hearing.

8. Whether the Claimant has two dependents for the purpose of augmentation;

9. Whether the named employer is the Responsible Operator;

10. Whether the Claimant's most recent period of cumulative employment of not less than one year was with the named Responsible Operator;

11. Whether the evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309; and,

12. Whether the evidence establishes a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial pursuant to 20 C.F.R. §725.310.[2]

(Dir. Ex. 35, Tr. 9-10)

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Claimant, Arnold Reynolds, was born on June 18, 1934, and completed a second grade education. (Dir. Ex. 31) The Claimant has two dependents for purposes of augmenting benefits, namely his wife, Colleen, whom he married on January 3, 1990, and his stepdaughter, Emily Ruth, who was born on November 8, 1982. (Dir. Ex. 1, 7, 34, Tr. 11-12, 14) The Claimant worked in coal mine employment for approximately twenty years. (Dir. Ex. 3, 4, 6, 34)

[2]A review of the procedural history indicates that this issue does not appear to be applicable herein. The Claimant's initial application was finally denied in 1992. The instant application was filed in 1994, and is before the undersigned as the result of Judge O'Neill's decision to vacate his original decision and order granting benefits, leaving no decision subject to modification herein.

The Claimant testified that his family physician is Dr. Sundaram. (Tr. 13) The Claimant is currently on oxygen sixteen hours per day. (Tr. 13)

Procedural History:

The Claimant filed his first application for benefits on March 1, 1976. (Dir. Ex. 31) The application was initially awarded, however, that award was set aside and vacated on July 21, 1983. (Dir. Ex. 31) The Claimant requested a hearing on July 13, 1984, and on May 22, 1987, the claim was referred to the Office of Administrative Law Judges for a formal hearing. (Dir. Ex. 31) A hearing was held before the undersigned on June 7, 1987, and on August 8, 1989, a Decision and Order denying benefits was issued. The Claimant filed a Petition for Reconsideration which was denied. He then filed an appeal with the Benefits Review Board (the Board), and on November 9, 1992, the Board affirmed the August 8, 1989, Decision and Order issued by the undersigned. (Dir. Ex. 31)

The Claimant filed his second application for benefits on November 29, 1994. (Dir. Ex. 1) It was initially denied by the District Director on June 20, 1995, and on June 27, 1995, the Claimant filed a request for a formal hearing. (Dir. Ex. 22) This matter was referred to the Office of Administrative Law Judges on February 22, 1996, and a formal hearing was held before Administrative Law Judge J. Michael O'Neill on December 4, 1996. (Dir. Ex. 33, 34) Judge O'Neill issued a Decision and Order Awarding Benefits on June 6, 1997. (Dir. Ex. 34) Therein, Judge O'Neill noted that the Employer was not represented at the hearing.

Upon motion filed by the Employer for reconsideration of the Decision and Order awarding benefits, Judge O'Neill granted the motion, vacated his decision, and remanded this matter to the District Director for development of the evidence by the responsible operator and for determination of the responsible operator. (Dir. Ex. 34) The Claimant filed an appeal with the Board on August 26, 1997, and on November 6, 1997, the Employer filed a Motion to Dismiss on the grounds that the Order being appealed was not a final judgment. The Board issued an Order on August 19, 1998, granting the Employer's Motion to Dismiss. (Dir. Ex. 34) The case was then referred to the District Director for further consideration. (Dir. Ex. 34)

On July 8, 1999, the District Director issued a Proposed Decision and Order awarding benefits, and naming Utility Coals, Inc. as the responsible operator. (Dir. Ex. 34) The Employer filed a timely request for a hearing, and on August 30, 1999, this matter was referred to the Office of Administrative Law Judges for a formal hearing. (Dir. Ex. 34, 35) A formal hearing was held before the undersigned on February 3, 2000.

Duplicate Claim:

In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for a modification. Section 725.309(d). The Claimant filed his original claim in 1976. That claim was finally denied on November 9, 1992. The current claim was filed on November 29, 1994, not within one year of the prior denial, so that it cannot be construed as a modification proceeding pursuant to Section 725.310(a). Therefore, according to Section 725.309(d) this claim must be denied on the basis of the prior denial unless there has been a material change in condition.

The United States Court of Appeals for the Sixth Circuit in the case of Sharondale Corp. v. Ross, 42 F.3d 993 (6th Cir. 1994) adopted the following standard for determining whether a miner has established a "material change in conditions." The Court stated:

> ...to assess whether a material change in condition is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Ross at 997-998.

The present claim arises in the Sixth Circuit.[3] Therefore, applying the Sharondale standard the evidence submitted subsequent to the date of the prior denial will be reviewed, to determine whether the Claimant has proven at least one of the elements of entitlement previously adjudicated against him. If the Claimant establishes the existence of that element, he has demonstrated, as a matter of law, a material change. If he is successful in establishing a material change, then all of the record evidence must be reviewed to determine whether he is entitled to benefits.

The previous claim was denied when it was determined that the Claimant did not establish the presence of pneumoconiosis, did not establish the existence of pneumoconiosis arising out of coal mine employment, or that he was totally disabled due to pneumoconiosis.

Length of Coal Mine Employment:

The Claimant alleged twenty-seven and a half years of coal mine employment in his application. (Dir. Ex. 1) The Social Security earnings statement shows coal mine employment from 1951 to 1976, for a total of twenty years. (Dir. Ex. 3) The record also contains W-2's and pay stubs from coal mine employers. (Dir. Ex. 4, 5) Based upon the documented evidence of record, I find that the Claimant was a coal miner for a total of twenty years. He last worked in the nation's coal mine in 1976. (Dir. Ex. 1, 3)

Responsible Operator:

Utility Coals, Inc. contends that it is not the responsible operator. (Tr. 10) At the hearing, the Claimant testified that he worked approximately one month for Utility Coals, Inc. (Tr. 14) Prior to that, he worked for Elkhorn Creek Coal Company for approximately two years, and for Little Bill Coal Company for about a year. (Tr. 14-15)

The Social Security earnings statement lists coal mine employment for Elkhorn Creek Coal, Inc. for a total of ten quarters from 1973 to 1975. The Claimant worked one quarter of 1975 for Little Bill Coal Company and one quarter in 1976 for Standard Sign & Signal Co., Inc., which Claimant indicated was the same as Utility Coals, Inc. (Tr. 15-

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[3] The Benefits Review Board has held that the law of the circuit in which the Claimant's last coal mine employment occurred is controlling. Shupe v. Director, OWCP, 12 BLR 1-200 (1989). The Claimant's last coal mine employment took place in Kentucky, which falls under the Sixth Circuit's jurisdiction.

16) In the prior hearing held in this matter in 1988, however, the Claimant testified that he did not know if Standard Sign & Utility Co, Inc. and Utility Coals, Inc. were the same employer. (Dir. Ex. 31)

The Director has named Utility Coals, Inc., insured by SMC Mining Company, as the responsible operator. (Dir. Ex. 27) The rationale given by the Director is that the Claimant last worked in 1975 for Little Bill Coal Company who, according to MSHA records on file at that time, was a successor to Elkhorn Creek Coal, Inc. The Director contends that Responsible Operator records in 1981 show that Little Bill Coal Co. was a contractor to Utility Coals, Inc., and therefore, Utility Coals, Inc. is the responsible party in this claim.

In particular, the Director asserts that Little Bill Coal Co. was a successor to Elkhorn Creek Coal Company, and became a contract operator for Utility Coals, Inc. after Little Bill Coal Company closed down in 1977. The Director also contends that the Underwriter's Safety & Claims, a service agent for Shell Oil Company at the time, submitted a list of coal companies in Kentucky which "Shell Oil owns and operates," which list included the three aforementioned companies. (Dir. Ex. 34) Therefore, the Director contends that Utility Coals, Inc. is the responsible operator.

Twenty C.F.R. §725.493 provides that the operator or other employer with which the miner had the last recent cumulative employment of not less than one year shall be considered the responsible operator. For purposes of Section 725.493(a), one year of coal mine employment may be established by accumulating intermittent periods of coal mine employment. Thus, the named operator is the responsible operator where (1) the operator is the claimant's most recent employer, and (2) the claimant's cumulative employment with the operator amounted to more than one year, even where the claimant worked for a different employer in between his work with the operator. Snedecker v. Island Creek Coal Co., 5 BLR 1-91 (1982) The Black Lung Reform Act of 1977 provides that any mine operator who acquired a mine or substantially all of its assets on or after January 1, 1970, from a mine operator who was an operator on or after January 1, 1970, will be liable for payments of all benefits which would have been payable to miners previously employed by such prior operator as if the acquisition had not occurred. Thus, the last successor operator who acquired the mine or substantially all of its assets on or after January 1, 1970, shall, if found financially capable, be liable for payment of all benefits. 20 C.F.R. §725.493(a)(2) and (a)(3). The evidence in the record on this issue is set forth below.

By letter dated April 4, 1988, Gary G. Gilmour, Vice President of Claims for Underwriters Safety & Claims, Inc. wrote the Deputy Commissioner, advising that, as the party administrator for several coal companies owned and operated by Shell Oil Company, it was requesting that copies of initial claims forms be sent to it. (Dir. Ex. 32) The list of coal companies in Kentucky which Shell Oil named included Utility Coals, Inc., Elkhorn Creek Coal and Little Bill #4 and #5.

A request made to the Responsible Operator Section from the Claims Examiner on January 23, 1995, requests the name, address and insurance carrier for Utility Coals, Inc. from 1973 to 1975. (Dir. Ex. 26) The response indicates that it has been verified by "SSA Earnings Record, MSHA records," that Utility Coals, Inc. is the responsible operator with SMC Mining Co. as the insurance carrier. The "rationale" listed is that the Claimant last worked for Little Bill Coal Company, who is a successor to Elkhorn Creek Coal, Inc. according to MSHA records on file at that time. "According to the RO section in 1981, Little Bill Coal Co. was a contractor to Utility Coals, with Utility Coals the responsible party in this claim." (Dir. Ex. 26) Computer print-out pages follow, none of which seem to indicate that Utility Coals, Inc. had a relationship with Little Bill Coal Co. in 1975. There is a notation that Ziegler Coal Holding Company purchased Shell Mining Company from Shell Oil Company and that all federal black lung obligations are the responsibility of Ziegler Coal Company after November 16, 1992.

A Claims Examiner wrote Ziegler Holding Company in February of 1995, stating that according to their records, the Claimant last worked in 1975 for Little Bill Coal Company. (Dir. Ex. 30) Their records further showed that Little Bill Coal Company was a successor to Elkhorn Creek Coal, Inc., and that Little Bill Coal Company was a contractor to Utility Coals, Inc. in 1981, with Utility Coals, Inc. being responsible for insurance coverage at that time.

On April 24, 1996, counsel from the Associate Regional Solicitor's office wrote the Associate Chief Judge, explaining that the Claimant last worked for Little Bill Coal Company, which was a successor to Elkhorn Creek Coal, and that Little Bill Coal Company was a contractor for Utility Coals, Inc. (Dir. Ex. 32) Relying upon the April 4, 1988 letter from Underwriters Safety & Claims, Inc., the argument was made that there was a connection between Shell Oil, Utility Coals and Ziegler Coal Holding Company.

In a letter dated May 2, 1996, Gary G. Gilmour, Senior Vice President of Underwriter's Safety & Claims, Inc. wrote Ziegler Coal to

advise that there was a misunderstanding as to the association between Shell Oil and the coal companies listed, as same was set forth in a letter to the Department of Labor on April 4, 1988. (Dir. Ex. 34) According to Mr. Gilmour, "[i]n fact, Shell Oil did not own and operate all of these coal operations, but rather had associations with some and owned others." Mr. Gilmour explained that the point of the letter was to ensure that proper documentation was received by Shell Oil when claims were filed. He did not mean that Shell Oil owned complete interest in any or all of these operations.

By letter dated September 4, 1998, the Senior Claims Examiner requested that Ziegler Coal Company, on behalf of Utility Coals, Inc., submit any available documentation relative to the issue of responsible operator in this claim.

Counsel for Ziegel Coal Company wrote a letter dated October 15, 1998, stating that there was no evidence that the Claimant was ever employed by Utility Coals, Inc.; that Little Bill Coal Company ever worked in any capacity for Utility Coals, Inc.; or that the Claimant worked for Little Bill Coal Co. at any time while Little Bill Coal Co. was working at Utility Coals and only at Utility Coals.

By letter dated October 19, 1998, the Senior Claims Examiner stated that since the Employer had failed to respond to the September 4, 1998 letter, the Director reaffirmed the finding that Utility Coals, Inc. was the responsible operator in this claim. (Dir. Ex. 34) In a subsequent letter dated October 20, 1998, the Claims Examiner stated that he had received the letter of October 15, 1998, and would concede that Utility Coals, Inc. was not properly designated as the responsible operator if Little Bill Coal Co. was not a subcontractor for Utility Coals, Inc. at the time of the Claimant's employment there in 1975. Documentation which indicated the periods that Little Bill Coal Co. may have been associated with Utility Coals, Inc., however, was requested.

By subsequent letter dated May 18, 1999, the Employer advised that it had received some additional information. (Dir. Ex. 34) Specifically, the Employer stated that old Profit and Loss Statements revealed that Little Bill Coal Co. had a contract mining relationship with Utility Coals, Inc. on three occasions. (Dir. Ex. 34) Two dates were in the early 1980's, and the other was in 1979.

In his original decision and order, which he subsequently vacated, Judge O'Neill determined that the Claimant's last coal mine employment of at least one year was with Elkhorn Creek Coal Co., Inc., which was owned by Shell Oil Co., and which had become SMC Mining Co. (Dir. Ex. 34) Therefore, Judge O'Neill found SMC to be the responsible operator.

In the prior decision issued by the undersigned in 1989, it was noted that the evidence was inconclusive regarding the issue of responsible operator. (Dir. Ex. 31) It was further found that the evidence presented by the Director on this issue consisted of internal memorandum. No objective evidence had been presented.

In his Proposed Decision and Order issued on July 8, 1999, wherein the District Director found the Claimant entitled to benefits, he determined that the Claimant was employed by Elkhorn Creek Coal Company in 1973, 1974 and 1975, as well as for Little Bill Coal Company in 1975. (Dir. Ex. 34) He noted that the records reveal that Little Bill Coal Company closed their operations in 1977 and that it was a contract operator for Utility Coals, Inc. The Director reasoned as follows:

> On April 4, 1988, Underwriter's Safety & Claims, a service agent for Shell Oil Company at that time, submitted a list of the coal companies in Kentucky which they advised "Shell owns and operates." This listing reflected the names of Elkhorn Creek Coal Company, Little Bill Coal Company, and Utility Coals, Inc. The Departmental records establish that Utility Coals, Inc. was self-insured through SMC Mining Company from 1973 to the present. The records also state that on or about November 16, 1992, Ziegler Holding Company purchased 100% of the stock of Shell Mining Company from Shell Oil Company. Thereupon, Shell Mining Company was renamed SMC Mining Company. The operator was granted the opportunity to submit evidence to the contrary, however, the information provided fails to alter this determination....Utility Coals, Inc. is the responsible operator for this claim.

It is the Director's burden to investigate and assess liability against the proper operator. England v. Island Creek Coal Co., 17 BLR 1-141 (1993). Where no operator can be identified, liability for the payment of benefits lies with the Black Lung Disability Trust Fund. 20 C.F.R. §§725.490 and 725.493(a)(4).

Upon review of the evidence, I do not find any compelling objective evidence in the record which affirmatively establishes that Utility Coals, Inc. was properly named the responsible operator herein. The letters written by Mr. Gilmour are contradictory, and insufficient to establish that Utility Coals, Inc. should be named the responsible operator. The Social Security earnings statement shows no employment with Utility Coals, Inc., and the Claimant's testimony also fails to affirmatively establish that he was employed by that company. There is no record of any relationship between Little Bill Coal Company and

Utility Coals, Inc. such as to render Utility Coals, Inc. the responsible operator herein. While the record contains numerous letters and internal memoranda from the Director regarding why Utility Coals, Inc. was named the responsible operator, the record continues to be devoid of any objective evidence establishing that fact. Accordingly, I find that the Director has failed to meet his burden of proof on the issue of responsible operator, and that therefore, Utility Coals, Inc. should be dismissed as the responsible operator herein.

Given that the Director has conceded that the Claimant is entitled to benefits in this matter, a discussion of the medical evidence is rendered moot, and the Black Lung Trust Fund is liable for benefits herein.

ATTORNEY'S FEES

No award of an attorney's fee for services to the Claimant is made herein because no application for fees has been made by the Claimant's counsel. Thirty (30) days is hereby granted to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. §725.365 and §725.320 of the regulations. A service sheet showing service has been made to all the parties, including the Claimant, must accompany the application. Parties have ten (10) days following receipt of such application to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Accordingly, the Black Lung Disability Trust Fund shall:

(1) Pay Arnold Reynolds all benefits to which he is entitled under the Act commencing as of November 1, 1994.

(2) Pay the Claimant's attorney, William Lawrence Roberts, Esquire, fees and expenses to be established in a supplemental decision and order.

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DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.